82-1626

NO.

in the
Supreme Court
of the
United States

October Term, 1982

THOMAS R. FARESE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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THOMAS R. FARESE

QUESTIONS PRESENTED

I

IN THE FEDERAL COURT SYSTEM MAY THE CORPUS DELICTI OF A CRIME BE PROVEN SOLELY BY THE UNCORROBORATED TESTIMONY OF AN ALLEGED ACCOMPLICE?

II

IF AN ESSENTIAL ELEMENT OF CRIMINAL LIABILITY IN A TITLE 21 U.S.C. §848 PROSECUTION IS A CONSPIRACY WITH FIVE OR MORE PERSONS, MUST A JURY BE INSTRUCTED THAT IT MUST UNANIMOUSLY AGREE ON AT LEAST FIVE OF THE SAME PERSONS WITH WHOM A DEFENDANT CONSPIRED IN ORDER TO CONVICT ON THAT OFFENSE?

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OPINION BELOW

The opinion of the Court of Appeals is reported as *United States v. Raffone and Farese*, 693 F.2d 1343 (11th Cir.1982). A copy of the opinion is included as an appendix to this Petition. This Petition seeks review only of the portion of the opinion affirming the conviction of Thomas R. Farese.[1]

JURISDICTION

The opinion of the Court of Appeals was rendered on December 20, 1982. A timely filed Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on February 3, 1983. This Petition was filed within 60 days of that date pursuant to Supreme Court Rule 20.1. Jurisdiction is conferred by Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V

No person shall be . . . deprived of life, liberty or property, without due process of law.

TITLE 21 U.S.C. §848.

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[1]Pursuant to Supreme Court Rule 21.1(b), the other party in the Court of Appeals was Geno P. Raffone.

CONTINUING CRIMINAL ENTERPRISE
(a) PENALTIES: FORFEITURES

(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2).

* * * *

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

STATEMENT OF THE CASE

Thomas Farese was convicted on one count of conspiracy to possess marijuana with intent to distribute and, although no marijuana was ever adduced as evidence, as a constructive possessor or aider and abettor on three counts of substantive acts of possession within the alleged conspiracy. Based upon the three substantive counts, he was also convicted of violating the Continuing Criminal Enterprise Statute, 21 U.S.C. §848.

The Government's case rested on the testimony of an alleged accomplice, John Piazza. In exchange for his testimony Piazza "was granted immunity from prosecution for a number of crimes", 693 F.2d at 1345, including two murders, various narcotics charges, bookmaking, conspiracy to drug racehorses and tax evasion (R. 722,755-756,842,890,960-962,966 and 1238). Piazza's criminal activities from 1968 to 1977 earned him "approximately one hundred million dollars income" (R. 890). In one year he spent four or five million dollars on racehorses. He owned 106 racehorses and 72 cars (R. 762-763).

Piazza had been previously convicted on major narcotics violations. In addition to immunity for his testimony against Farese, the Government also gave Piazza an early parole, allowed him to avoid a possible life sentence, and allowed his mother, who faced thirty years as a co-defendant with her son, to receive six months imprisonment (R. 715,893).

The opinion below leaves no doubt that Piazza's testimony was used to establish the corpus delicti of

the respective offenses: i.e., the requisite illegal agreement (conspiracy, Count I); the existence of marijuana in October, 1975 (possession, Count II); the existence of marijuana in November or December, 1976 (possession, Count III); the existence of marijuana in March, 1977 (possession, Count IV); the conspiratorial acting in concert with five or more persons (continuing criminal enterprise, Count V). See the indictment at Appendix, p 16.

While the opinion concluded there was "substantial corroboration of Piazza's story", 693 F.2d at 1345, a careful reading of the proffered evidence offered in the opinion confirms the fact that it is only Piazza's testimony which actually established the respective corpus delicti.[2]

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[2]The Court wrote:

> As to Count Four, Piazza testified that, following the Zambito arrest, he, Dello Russo, and Farese discussed arrangements for a future delivery of marijuana. By February or March of 1977, 2,000 pounds was delivered to a "stash house". In addition to certain declarations of Caruso and Raffone further linking Farese to this transaction, Piazza testified that he talked with Farese personally in the driveway of the stash house concerning the distribution of the marijuana.
> 693 F.2d at 1345-47, n.4.

The Count II, *October, 1975*, possession count, was "corroborated" by seeds, stems and smells of marijuana in a truck lent by Farese to his secretary in *February, 1976*, and "brownish leaves" found in a ship owned by Farese's company in *March, 1976*. 693 F.2d at 1345-46, n.3. (The opinion fudges the dates, saying "early 1976" and "later in 1976", but the months referred to above are the accurate dates.)

The December, 1976 scent of marijuana in a truck rented by Farese's company was the primary Count III corroboration. 693 F.2d at 1346.

In order to convict on the §848 charge, the Government was obligated to prove the three substantive offenses as a predicate, and the additional fact that Farese acted in concert with and supervised "five or more other persons" in committing those offenses. The opinion below concluded the government, through Piazza's testimony met its burden.[3]

The Court below also rejected Farese's contention that the failure to instruct the jury that it must unanimously decide with which five or more persons he allegedly conspired was either necessary or plain error. 693 F.2d at 1348. That instruction had not been requested at trial, but on appeal Farese claimed the

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(Footnote 2 Continued)

The various illegal agreements necessary to prove the §846 and §848 conspiracies were the product of Piazza's stories, 693 F.2d at 1345-48, (notes), and the Court's substantial reliance upon the fact that on tape Farese "observed" that a "newspaper article about legitimate shipping companies importing narcotics and marijuana . . . was referring to his companies," in addition to mentioning hiding $5,000, "fresh harvest", "legitimate deals" and "the need for things to 'blow over' ". 693 F.2d at 1345-46, n.3. Assuming arguendo the initial newspaper comment can even carry a negative implication, the opinion below acknowledged the tapes were relevant to "a massive marijuana conspiracy operation", *id.* Even if the tapes did corroborate the conspiracy, that does not sanction their use as corroboration of the corpus delicti of the three distinct substantive possession offenses or the five or more specific persons illegal agreement which is the *sine qua non* for the §848 offense.

[3]Farese's predicate substantive offense convictions were based on theories of vicarious liability. 693 F.2d at 1346-47. The alleged actual possessors were all contemporaneously or subsequently acquitted. 693 F.2d at 1345, n.2. Two of the five §848 cohorts

five person requirement was an essential element of the §848 offense mandating unanimous jury agreement.

Certiorari is sought to review the questions raised by the use of uncorroborated accomplice testimony to establish the corpus delicti of an offense, and the responsibility of a trial Court to insure that jury verdicts are based upon instructions which set forth essential elements of the crimes charged.

(Footnote 3 Continued)

named by the Court of Appeals were acquitted prior to or subsequently to Farese's conviction for "supervising" them. Of the other three, one was Piazza and the other two were unindicted and untried. 693 F.2d at 1349.

The panel held that *Standefer v. United States*, 447 U.S. 10 (1980) permits such outcomes. 693 F.2d at 1348-49. The language of *Standefer* seems to render futile an attempt to challenge that holding on certiorari, so we do not belabor it. But to the extent that *Standefer* emphasizes the Government's burden of proving beyond a reasonable doubt all the essential elements of the charged offenses, including the criminality of the absent actors, 447 U.S. at 26, we submit that application of the *Standefer* principle requires close scrutiny of the evidence and instructions which occasion results as incongruous as those here. This Petition's focus on the quality of the evidence and instructions is therefore especially appropriate in light of *Standefer's* promise to "not deviate from the sound teaching that 'justice must satisfy the appearance of justice' ". 447 U.S. at 25.

REASONS FOR GRANTING CERTIORARI

I

THE DECISION BELOW PRESENTS THE IMPORTANT BUT UNANSWERED QUESTION OF WHETHER, IN THE FEDERAL SYSTEM, THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE MAY BE USED TO ESTABLISH THE CORPUS DELICTI OF AN OFFENSE

The Petitioner challenged the use of uncorroborated accomplice testimony to establish the corpus delicti—the very existence—of the crimes charged. With respect to the conspiracy charge, the corpus delicti is an illegal agreement. The substantive possessory offenses corpus delicti require establishment of the existence of the contraband. The §848 offense requires establishing an illegal agreement with five or more persons and multiple violations of drug laws as the corpus delicti of that crime.

The Court below rejected the corpus delicti corroboration claim because it "found no binding precedent" supporting Petitioner's argument. Instead, the Court below hued to the former Fifth Circuit rule

"that convictions can be based upon the uncorroborated testimony of an accomplice . . ." 693 F.2d at 1343.[4]

While that is the general rule in federal prosecutions, it has caused concern for some time. *Krulewitch v. United States*, 336 U.S. 440,453-54 (1949) (Jackson, J., concurring, joined by Frankfurter and Murphy, J.J.), cf. *United States v. Darland*, 659 F.2d 70,72,n.4 (5th Cir. 1981).

Nineteen states require corroboration of an accomplice's testimony in order to sustain a conviction.[5]

But neither the federal courts, nor the remaining thirty-one states, have ever addressed the question as framed by the Petitioner: whether uncorroborated

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[4]We have discussed *supra*, at n.2, the Court's view of corroboration and why that view is unsupported by the opinion. Additionally, the conclusion must be taken with caution because there is a danger in assuming a court's response to an argument will be the same if the rejected legal theory were approved and provided the framework for analysis. cf. *Patterson v. Alabama*, 294 U.S. 600,607-07 (1935).

[5]Ala.Code §12-21-222 (1975); Alaska Stat.§12.45.020 (1968); Ark.Stat. Ann.§43-2216 (1947); Cal.Penal Code §1111 (West 1970); Ga.Code §24-4-8 (1981); Idaho Code §19-2117 (1979); Iowa Code Ann. §813.2 Rule 20(3) (West 1979); Maryland, *Brown v. State*, 281 Md.241,378 A.2d 1104 (1977); Michigan, *People v. Barron*, 381 Mich.421,163 N.W.2d 219 (1968); Minn.Stat.Ann. §634.04 (West 1947); Mont.Code Ann. §46-16-213 (1981); Nev.Rev.Stat. §175.291 (1981); N.Y. Crim.Proc. §60.22 (McKinney 1981); N.D.Cent.Code §29-21-14 (1974) [but see N.D.Cent.Code §12.1-23-9(4) (Supp.1981)]; Okla.Stat.Ann.tit.22 §742 (1969); Or.Rev.Stat. §136.440 (1981); S.D.Comp.Law.Ann. §23A-22-8 (1979); Tenneseee, *Proctor v. State*, 565 S.W.2d 909 (Tenn.Crim.App.1978); Tex.Stat.Ann.art. 38.14 (Vernon 1979).

accomplice testimony may establish the specific injury which constitutes the corpus delicti or body of the crime.[6]

An example is helpful to demonstrate the distinction and the scope of the issue. Assume *A* goes to the police station and confesses to possession of marijuana on the previous evening. There could be no conviction, because

> [i]t is a settled principle of the administration of criminal justice in the federal courts that a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused.
>
> *Wong Sun v. United States*, 371 U.S. 471,488-89 (1963).

Assume *A* went to the police station and confessed that he and *B* possessed marijuana. Under the rule that "uncorroborated accomplice testimony is sufficient", *A* could convict *B*, but not himself.

No federal or state court has reached that absurd result. If the police returned to *A*'s house and found

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[6]See West Publishing Co. Key Criminal Law 511.1(5) "Corroboration of accomplice: proof of corpus delicti". None of the thirty-one states allowing use of uncorroborated accomplice testimony have a case under this key number.

In the federal cases using the uncorroborated accomplice testimony, the fact that a crime occurred (like a burglary or a robbery) was already established, or its existence was established by more than the uncorroborated testimony of a lone accomplice. A careful survey of the many cases cited in *Tillery v. United States*, 411 F.2d 644,647, n.1 (5th Cir.1969) confirms the point.

the marijuana corpus delicti, or if a neighbor testified he saw *B* carrying bulky burlap-bagged packages into the house, then *B* could be convicted because there would be corroboration to establish the existence of the body of the crime.

We contended below that allowing uncorroborated accomplice testimony to establish the corpus delicti of crimes conflicts with the underlying premises of earlier decisions of this Court. To the extent that no case specifically addresses the issue in the context presented here, Petitioner urges that certiorari be granted to address this important but unanswered question relating to the administration of criminal justice in the federal system.

II

THE DECISION BELOW CONFLICTS WITH THE VIEWS OF *WONG SUN v. UNITED STATES*, 371 U.S. 471 (1963), *SMITH v. UNITED STATES*, 348 U.S. 147 (1954), *HOLMGREN v. UNITED STATES*, 217 U.S. 509 (1910), and *WASHINGTON v. TEXAS*, 388 U.S. 14 (1967)

The "corpus delicti rule", which requires corroboration of an accused's confession, *Wong Sun, supra*, has been consistently applied in federal and state courts.

> Its purpose is to prevent "errors in convictions based upon untrue confessions alone" . . .; its foundation lies in a long history of judicial experience with confessions and in the realization that . . . [c]onfessions may be unreliable because

> they are coerced or induced . . . [or] be suspect if it is extracted from one who is under the pressure of police investigation.
>
> *Smith v. United States*, 348 U.S. 147,153 (1954) (citation omitted).

The independent corroboration corpus delicti rule has generally focused on the admissions of an accused. 7 Wigmore, §§2070-2072 (Chadburn Rev. 1978, Perkins on Criminal Law, p.97 et seq. 2d Ed.1969). But the theoretical and historical underpinnings of the rule make it equally applicable to the corpus delicti testimony of a self-proclaimed accomplice, especially when he has been excused from his own criminality in exchange for his testimony.

In *Holmgren v. United States*, 217 U.S. 509,524 (1910), the Court urged caution against too much reliance on the testimony of accomplices and said it was the "better practice . . . to require corroborating testimony before giving credence to them".

Wong Sun quoted with approval an author who spoke of accomplice testimony as a "tainted source", 371 U.S. at 490, n.17.

In *Washington v. Texas*, 388 U.S. 14 (1967), the Court struck a Texas statute forbidding a defendant from calling an accomplice as a defense witness. The Court called absurd its premise, that an accomplice will lie in favor of a defendant, saying:

> Common sense would suggest that he often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large.

Id. 388 U.S. at 22-23.

Thus, while no case from this Court has addressed the precise issue raised here, the logic and concerns of the principal cases support the argument for corroboration when the accomplice's testimony is used to establish the corpus delicti of an offense. In *Wong Sun*, the Court wrote:

> Where the crime involves physical damage to person or property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur, and that some person was criminally culpable. A notable example is the principle that an admission of homocide must be corroborated by tangible evidence of the death of the supposed victim. See 7 Wigmore Evidence (3rd ed.1940), §2072 n.5. There need in such a case be no link, outside the confession, between the injury and the accused who admits having inflicted it. But where the crime involves no tangible corpus delicti, we have said that "the corroborative evidence must implicate the

accused in order to show that a crime has been committed". 348 U.S. at 154.

Id. 371 U.S. at 489-490 n.15.

By allowing uncorroborated accomplice testimony to supply the tangible corpus delicti of marijuana allegedly possessed on certain dates, the decision below presents conflict with the *Wong Sun* theorem. By allowing uncorroborated accomplice testimony to establish the intangible corpus delicti of illegal agreement and the conspiracy of five or more persons committing multiple tangible violations, the decision below presents conflict. Certiorari should be granted to resolve those conflicts.

III

THE DECISION BELOW PRESENTS AN IMPORTANT BUT UNANSWERED QUESTION OF THE ESSENTIAL ELEMENTS REQUIRED FOR PROOF OF CRIMINALITY UNDER TITLE 21 U.S.C. §848 AND CONFLICTS WITH *JEFFERS v. UNITED STATES*, 432 U.S. 137 (1977), AND THE DUE PROCESS CLAUSE

Title 21 U.S.C. §848 imposes criminal liability upon a defendant who, in a supervisory capacity, acts "in concert with five or more other persons" to commit a continuing series of felony drug violations.

In *Jeffers v. United States*, 432 U.S. 137,148-50, n.14 (1977), the Court, citing the statute's plain language

and its extensive legislative history, assumed that the in concert requirement of §848 "does require proof of an agreement among the persons involved in the continuing criminal enterprise". The Court stated: "Clearly, then, a conviction would be impossible unless concerted activities were present."

On appeal, Farese sought reversal because the trial judge failed to instruct the jury "that it must unanimously agree on the identities of at least five persons who acted in concert with, and under the direction of, the [defendant]". 693 F.2d at 1347.

Because the Court below found no cases to support the proposition, it found no plain error and rejected the argument: "The failure of the contended for rule to surface in the dozens of cases surveyed casts doubt upon its validity." 693 F.2d at 1348.

The concurring panel member disassociated himself "from any implied resolution of that [unanimity] legal issue", but concluded that the general instructions were sufficient. 693 F.2d at 1349-50.

If the *Jeffers* view of §848 is correct, proof beyond a reasonable doubt of a six-person agreement (the supervisor plus at least five subordinates) is an essential element of a §848 offense.

Unless a jury is instructed that it must unanimously agree on at least five of the same persons with whom the supervisor acted in concert, half the jury could conclude that *A*, *B*, *C*, *D* and *E* were the co-conspirators, while the other jurors could conclude that *A*, *B*, *C*, *D*

and *F* were the cohorts. If that occurred, the jury would be unanimous on only four (*A*, *B*, *C* and *D*), not the required five, supervisees.

In *In re Winship* 397 U.S. 358,364 (1970), the Court wrote:

> Lest there be any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Since proof of an illegal agreement with five cohorts is a fact necessary to constitute a violation of §848, failure to instruct the jury of the need to agree on at least five of the same persons as an essential element of the offense permits a conviction to occur on less than the required quantum of evidence. Such a result would violate the Due Process Clause and constitute plain error under Rule 52(b), Fed.R.Crim.P., See 3A Wright, *Federal Practice and Procedure*: Criminal 2d, §856 (1982). Nor could this plain error be harmless, *id.* at §856, p.344, or escape the concern voiced in *Kotteakas v. United States*, 328 U.S. 750,764 (1946) for the effect of the error upon a jury's decisional process.[7]

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[7]The question of which five persons Farese conspired with and supervised was a major disputed issue. After repeated requests of the Government to name the five or more persons, the prosecution named only Patrick Robinson (R. 2748), who was being tried with Farese as a co-defendant on the Count I conspiracy charge. (Robinson was acquitted by the jury (R. 3173)). Four Circuits hold that

If the in concert elements of §848 have the conspiratorial scope assumed, but not resolved in *Jeffers*, then the decision below conflicts with *Jeffers* and the Due Process Clause.

(Footnote 7 Continued)

failure to instruct on an essential element, especially if it is disputed, constitutes plain error under Rule 52(b), Fed.R.Crim.P., See *Byrd v. United States*, 342 F.2d 939 (D.C.Cir.1965); *United States v. King*, 587 F.2d 956,965-66 (9th Cir.1978); *United States v. Odell*, 462 F.2d 224,232 (6th Cir.1972); *Government of Virgin Islands re Brown*, 685 F.2d 834, 839-40 (3rd Cir.1982).

The Fifth Circuit takes a much more flexible approach to failure to instruct on an essential element. See *United States v. Brown*, 616 F.2d 844, 846-47 (5th Cir.1980). Under *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981), the Court below was bound to the *Brown* approach. However, no matter which tack to plain error is taken, in a case where the Bill of Particulars bandied about at least 40 names ("The Shiek", "The Prince", "Red" (App. 27)) and the testimony touched on even more names, one cannot say how the jury would have been influenced by a proper instruction; therefore, the error is plain, and not remediable by appellate review of the evidence. *Kotteakas*, 328 U.S. at 763.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted. This Court should decide whether uncorroborated accomplice testimony may be used to prove the corpus delicti of a crime in a federal prosecution and whether a jury must be instructed that it has to unanimously agree on at least five of the same persons supervised and conspired with by a defendant charged with engaging in a continuing criminal enterprise.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit has been furnished by U.S. Mail to ROBERT LEHNER, Assistant United States Attorney, 77 Southeast 5th Street, Miami, Florida 33131, and GLORIA PHARES, Appellate Section, Department of Justice, Ben Franklyn Station, P. O. Box 899, Washington, D. C. 20044, and two copies to REX E. LEE, Solicitor, General, Washington, D. C., this _____ day of _____, 1983.

_____

BRUCE S. ROGOW

UNITED STATES of America,
Plaintiff-Appellee,

v.

Geno Pasquale RAFFONE,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Thomas Ralph FARESE,
Defendant-Appellant.

Nos. 81-5163, 81-5257.

United States Court of Appeals,
Eleventh Circuit.

Dec. 20, 1982.

Appeals from the United States District Court for the Southern District of Florida.

Before VANCE and ANDERSON, Circuit Judges, and ALLGOOD*, District Judge.

ALLGOOD, District Judge:

Appellants Farese and Raffone were tried and convicted on one count (Count One) of conspiracy to possess marijuana with the intent to distribute it in

violation of 21 U.S.C. §846. Appellant Farese was also convicted of three substantive acts (Counts One through Four) of possession with the intent to distribute in violation of 21 U.S.C. §841(a)(1). For his role in overseeing the events giving rise to the above charges, appellant Farese was tried and convicted of engaging in a continuing criminal enterprise in violation of 21 U.S.C. §848 (Count Five). Appellants now contest their convictions on a number of grounds, several of which are examined below. Those not examined are either without merit or pertain to errors which were harmless.

I. FACTS

According to the evidence, Farese was the mastermind of a drug importation and distribution network centered in the Miami-Fort Lauderdale, Florida area. This "organization" supplied marijuana to local distributors who, in turn, distributed it to other cities. Farese ran this operation through a number of "lieutenants" and other, lesser-ranked, individuals.

Indicted as co-conspirators were several alleged members of the Farese network: Joseph Caruso, Patrick Robinson, John Scimone, and Robert Dello Russo.[1] In addition to Farese, those indicted on the substantive counts included: Caruso, Counts Two through Four; Scimone, Count Two; and appellant Raffone, Count Four.[2] Unindicted members of the Farese organization

[1]None of these defendants were found guilty.

[2]With the exception of Farese, none of the defendants were found guilty on the substantive counts.

allegedly included Alan Rivenbark and Nicholas Forlano, among others.

The Government's principal witness was John Piazza. Piazza was one of the local distributors with whom the Farese organization dealt. In exchange for his testimony, he was granted immunity from prosecution for a number of crimes. The Government's case also included surveillance evidence, court-authorized tape-recordings, and other witnesses.

The indictment alleged that the conspiracy upon which the appellants were convicted occurred continuously from May of 1974 to April of 1977. Although a number of overt acts amounting to substantive violations were alleged, the specific acts giving rise to the three substantive counts were as follows: Count Two—Scimone and Forlano arranged the delivery of 200 or 250 pounds of marijuana to Piazza in October of 1975; Count Three—Scimone and Forlano were involved in the delivery by Caruso to Piazza of 1,000 pounds of marijuana near the end of 1976 or the beginning of 1977; Count Four—as a result of discussions between Farese, Caruso and Piazza, 2,000 pounds of marijuana were delivered to the "stash house" of Piazza and Dello Russo in March of 1977.

II. THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE

[1] Appellants argue at great length that the testimony of Piazza was uncorroborated and that their convictions may not rest solely upon the uncorroborated testimony of an accomplice. The former Fifth Circuit has repeatedly held, however, that convictions can be

based upon the uncorroborated testimony of an accomplice, if that testimony is not incredible or insubstantial on its face. *E.g., United States v. Darland*, 659 F.2d 70, 73 (5th Cir.1981), *cert. denied, Darland v. United States*, ____ U.S. ____, 102 S.Ct. 1032, 71 L.Ed.2d 315 (1982); *United States v. Moreno*, 649 F.2d 309, 312 (5th Cir. 1981); *United States v. Bolts*, 558 F.2d 316, 323 (5th Cir.1977), *cert. denied*, 434 U.S. 930, 98 S.Ct. 417, 54 L.Ed.2d 290 (1977) and 439 U.S. 898, 99 S.Ct. 262, 58 L.Ed.2d 246 (1978). Indeed, although it was not necessarily required to do so, the district court did instruct the jury to examine the accomplice testimony "with great care."

[2] Appellants nevertheless urge this court to recognize a distinction between the use of uncorroborated accomplice testimony to prove a "mere element" of a crime and its use to prove the corpus delicti of a crime. Specifically, appellants ask this court to analogize to the principle that the corpus delicti of a crime may not be established solely by the uncorroborated confession of an accused. *See Wong Sun v. United States*, 371 U.S. 471, 488-89, 83 S.Ct. 407, 417-18, 9 L.Ed.2d 441 (1963). They support this analogy with their assertion that the possibility that an accused may confess to a non-existent crime is much more remote than the possibility that an accomplice, who, as in this case, has been immunized from prosecution, will "confess" to a non-existent crime.

This court has found no binding precedent recognizing the distinction being urged by the appellants. Former Fifth Circuit cases setting forth the law on this subject make no such distinction; nor is this court inclined to do so. Even if such a distinction were

recognized, however, our disposition of the instant case would be no different since the record reveals substantial corroboration of Piazza's story.[3]

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[3]Corroboration for Piazza's testimony takes several forms. The description below of several examples of such corroboration is not intended as an exhaustive survey thereof.

In early 1976 Farese lent his secretary a truck for a household move. According to the testimony of the secretary, and/or her boyfriend, the truck smelled of marijuana and contained some marijuana seeds and stems. Later in 1976, Antonio Cerqueira, a naval engineer who worked for the Farese owned Olympic Shipping Lines, flew to Cayman Brac to make repairs on one of Olympic's ships, the Caribe Express. He testified that he reported to Mr. Farese hearing about the use of the Caribe Express for the transportation of cocaine and marijuana. According to Cerqueira's testimony, Farese told him to forget what he had heard, not to mention it, and to go back and finish his work. Cerqueira testified that upon returning to Cayman Brac, police officers showed him "some brownish leaves" in the cargo hold of the Caribe Express.

In December of 1976, a Hertz rental truck which had been rented by Farese's company and parked in his driveway was returned smelling strongly of unsmoked marijuana. About a month later, one Rhett Zambito was arrested with over a hundred pounds of marijuana in his possession. Piazza testified that he gave Zambito 158 pounds of marijuana from the late 1976 delivery.

All of this corroborates Piazza's story as to the events giving rise to Counts Two and Three and, with the exception of the Zambito arrest, also tends to corroborate the conspiracy theory. Tape recordings of conversations in Farese's office provide further strong support for Farese's involvement in a massive marijuana conspiracy operation. At one point in those recordings, Farese referred to a newspaper article about legitimate shipping companies importing narcotics and marijuana and observed that the article was referring to his companies. Elsewhere Farese talked of always being able to run and hide with $5,000.00 if it became necessary, and of a "fresh harvest" in September. Among other things, Farese also spoke of the need for a couple of "legitimate deals" and the need for things to "blow over."

III. LINKING FARESE TO THE SUBSTANTIVE ACTS

[3] Farese (hereinafter, "appellant") also argues that even if uncorroborated accomplice testimony will suffice to support a conviction, Piazza's testimony did not sufficiently connect Farese to the events giving rise to the substantive counts. Initially it should be noted that although a conspirator may be held liable for substantive crimes committed by a co-conspirator in furtherance of the conspiracy, *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), the jury was not so instructed in this case. Farese's conviction cannot, therefore, be sustained on a *Pinkerton* theory. *See Nye & Nissen v. United States*, 336 U.S. 613, 618, 69 S.Ct. 766, 769, 93 L.Ed. 919 (1949). If appellant's conviction on the substantive counts is to be sustained, evidence must have been submitted to the jury sufficient to support either a constructive possession or an aiding and abetting theory as to each count.

[4] The evidence was sufficient to support either of the above theories. Substantial evidence existed that the various persons who were in actual possession of the marijuana worked for Farese and were under his control. The jury might therefore have found that Farese was in constructive possession of the marijuana involved in Counts Two through Four. *See, e.g., United States v. Gloria*, 494 F.2d 477, 482 (5th Cir.1974), *cert. denied*, 419 U.S. 995, 95 S.Ct. 306, 42 L.Ed.2d 267 (1974).

A careful review of the testimony also reveals that Piazza's testimony, as well as other evidence, did link Farese directly to the events in question in such a

way as would support an aiding and abetting theory.[4] Furthermore, even if there had been no evidence tying Farese directly to the events in question, a conviction based on the theory of aiding and abetting would not have been foreclosed. There was ample evidence tending to show that Farese, in his position as the "mastermind" of the operation in question, aided and abetted his "subordinates" as they carried out the acts described

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[4]As to Count Two, Piazza testified that Scimone introduced him to Forlano in October of 1975. According to Piazza's testimony, Forlano said he would talk with Farese and try to arrange for Piazza to get back into "the business" as he had been once before. The testimony of Farese's secretary and his naval engineer is also relevant to Count Two. *See* note 3, *supra.*

As to Count Three, in October of 1976, Caruso and Piazza discussed a disputed debt to the Corsa Boat Company from a prior marijuana deal. (Piazza linked many of Farese's lieutenants to Corsa.) Caruso told Piazza that the debt didn't matter because they were "starting over" and then arranged a 500 pound delivery. Later in 1976, or in early 1977, a separate 1,000 pound delivery was made which gave rise to Count Three.

The Zambito arrest and the discovery of the Hertz truck were also made about this time. *See* note 3, *supra.* Piazza testified that he met directly with Farese to discuss who would bear the loss resulting from the Zambito arrest and that Farese personally took possession of the proceeds of the sale of a part of the marijuana involved in Count Three.

As to Count Four, Piazza testified that, following the Zambito arrest, he, Dello Russo, and Farese discussed arrangements for a future delivery of marijuana. By February or March of 1977, 2,000 pounds was delivered to a "stash house." In addition to certain declarations of Caruso and Raffone further linking Farese to this transaction, Piazza testified that he talked with Farese personally in the driveway of the stash house concerning the distribution of the marijuana.

in Counts Two through Four. *See Nye & Nissen v. United States*, 336 U.S. at 619, 69 S.Ct. at 769 (1949) (involving a series of substantive crimes committed by the petitioner's subordinates).

IV. THE CONTINUING CRIMINAL ENTERPRISE

A. *The Unanimity Requirement*

[5] Appellant contests his conviction under 21 U.S.C. §848[5] on two grounds. The first is that the trial court erred in not instructing the jury that it must unanimously agree on the identities of at least five persons who acted in concert with, and under the direction of, the appellant.

While citing no direct authority for this proposition, appellant begins his discussion of this issue with an examination of the holdings in *United States v. Gipson*,

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[5]Section 848 makes it a crime to engage in a "continuing criminal enterprise." Under 21 U.S.C. §848(b), one engages in a continuing criminal enterprise if

> (1) he violates any provision of this title or title III the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this title or title III
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

553 F.2d 453 (5th Cir. 1977) and *United States v. Morris*, 612 F.2d 483 (10th Cir. 1979). Farese Brief at 85-88. A close reading of these cases, however, reveals that *Gipson* is inapposite and that *Morris* contains certain language which, if anything, supports the Government's position on this issue.[6]

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[6]*Morris* involved the conviction of four defendants under 18 U.S.C. §1955 which prohibits illegal gambling businesses "involv[ing] five or more persons." The jury also returned a verdict of guilty as to a fifth defendant, but, upon polling the jury, the trial court discovered that this was not the verdict of one of the jurors, Mr. Mould. The trial court then directed the jury to retire to the jury room to reconsider the verdict as to the fifth defendant. After further deliberation, Mr. Mould continued to disagree with the other jurors and the court delcared a mistrial as to the fifth defendant. The court refused, however, to grant the requests of the defense attorneys that the jury then be repolled as to the other four defendants.

In remanding the case for a new trial, the Court of Appeals noted that when Mr. Mould decided that the fifth defendant was not a participant in the gambling business, this signalled an uncertainty about his votes as to the other four defendants. Although there were three unindicted participants in the gambling business, one of whom Mould might have had in mind as the fifth man in the operation, it was unclear that this was the case. The court noted that the fifth defendant might well have been the only other participant in Mould's view when he found the other four defendants guilty. 612 F.2d at 489-490, n. 12.

The support for the Government's position is derived from the Court of Appeal's emphasis on Mould's previous votes as to the other defendants. Speaking of Mould, the court felt it important that the fifth defendant "might have been the only other participant in *his* view." *Id.* at 490, n. 12 (emphasis added). No concern at all was expressed that the selection of a fifth participant by Mould be congruent with that of his fellow jurors. The court's analysis implied that no such congruency was required. *Id.* at n. 12 and accompanying text.

Somewhat more analytically, the appellant also notes that the "in concert" language of §848 encompasses the same type of "agreement" necessary to the existence of a conspiracy. *Jeffers v. United States*, 432 U.S. 137, 149-50, 97 S.Ct. 2207, 2215, 53, L.Ed.2d 168 (1977) ("For the purposes of this case, therefore, we assume, arguendo, that §848 does require proof of an agreement among the persons involved in the continuing criminal enterprise."). In order for a jury to convict a given defendant of conspiracy, according to the appellant, there must be unanimous agreement as to the identities of the various conspirators. Appellant concludes, therefore, that a jury must unanimously agree on the identities of the five co-conspirators necessary to a §848 conviction.

Appellant cites no authority, however, for his assertion that, in a normal conspiracy case, the jury must unanimously agree as to the identities of the co-conspirator(s). The independent efforts of this court have likewise revealed no such authority. The failure of the contended for rule to surface in the dozens of cases surveyed casts doubt upon its validity.

The appellant in this case failed to request that the jury be instructed that it must unanimously decide with which "five or more other persons" appellant acted in concert. For the reasons set forth above, we perceive no plain error in the trial court's failure to have given such an instruction.

B. *Finding at Least "Five or More Other Persons."*

[6] Appellant also contends that the evidence at trial was insufficient to convict him of a §848 violation.

Once again focusing upon §848's "five or more other persons" requirement, appellant contends that the Government failed to adduce substantial evidence that Farese acted in concert with *any* five persons mentioned at trial. An examination of the record, in light of certain legal principles, leads this court to a contrary conclusion.

Appellant relies heavily on the fact that of the eight persons which the jury might reasonably have viewed as acting in concert with Farese,[7] four of them were "acquitted:" Robinson, Scimone, Dello Russo and Caruso. He argues, therefore, that "substantial evidence" necessarily did not exist as to their guilt in regard to the acts which allegedly were the predicate offenses[8] of the §848 charge.

Assuming, *arguendo*, that appellant's "acquittal argument" is not without merit,[9] it does not apply to all four of the above-named defendants. Of the four, only Robinson was acquitted as the result of a jury verdict in the Farese trial. As to the others: Scimone's motion

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[7]Robinson, Scimone, Dello Russo, Caruso, Rivenbark, Forlano, Piazza and Raffone.

[8]Those offenses were satisfied §848(b)(2)'s requirement of a "continuing series of violations."

[9]Appellant's argument here appears to be based upon the traditional rule that a defendant may not be convicted of conspiracy in the same trial in which all of his alleged co-conspirators are acquitted. *See, e.g., Herman v. United States*, 289 F.2d 362, 368 (5th Cir. 1961), *cert. denied*, 368 U.S. 897, 82 S.Ct. 174, 7 L.Ed.2d 93 (1961). Recently, however, that rule has been questioned. *See United States v. Espinosa-Cerpa*, 630 F.2d 328, 331-333 (5th Cir. 1980).

for a judgment of acquittal was granted by the trial judge; the indictment against Dello Russo was dismissed on collateral estoppel grounds; and Caruso's acquittal came in a subsequent trial. Because of the manner in which their indictments were disposed of, it is clear that the jury was not barred from considering at least Dello Russo and Caruso as two of the required "five or more other persons."[10]

In *Standefer v. United States*, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980), the Supreme Court ruled that the acquittal of a charged principal does not foreclose the subsequent conviction of an aider and abettor. The former Fifth Circuit Court of Appeals relied upon *Standefer* in ruling that the acquittal of all of a defendant's alleged co-conspirators does not prevent that defendant's subsequent conspiracy conviction in a separate trial. *United States v. Espinosa-Cerpa*, 630 F.2d 328 (5th Cir. 1980). Fundamental to both decisions was the recognition that juries are free to render "not guilty" verdicts as the result of "compromise, confusion, mistake, leniency, or other legally and logically irrelevant factors." *Espinosa-Cerpa*, 630 F.2d at 332 n. 4.

The fact that the charge against Dello Russo which was dismissed was part of the Farese indictment does not alter the fact that the jury decision necessitating its dismissal was made in a prior trial. Caruso's acquittal also came in a separate jury trial. As in *Standefer* and *Espinosa-Cerpa*, it is possible that those verdicts were based on "legally or logically irrelevant factors." The evidence was otherwise not insufficient for the jury to

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[10]As for the includability of Scimone, *see* note 11, *infra*.

have counted Dello Russo and Caruso as two of the five persons required under §848.[11]

Falling completely outside of the appellant's "acquittal argument" are Forlano, Rivenbark, and Piazza. These three were not even indicted. Substantial evidence existed that they acted in concert with, and under the direction of, Farese and the jury could have rationally counted them as doing so. These three, plus Dello Russo and Caruso, make the necessary five.[12]

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[11]Scimone might also properly have been included. According to the Government, the trial judge who granted Scimone's motion for acquittal subsequently stated that "one of the reasons I acquitted Scimone was the many trials, . . . I thought he was going to die and I was not interested in trying him. . . . I either had to sever out Mr. Scimone or acquit him. Believe me, that does not inure to the benefit of anybody else in the case. I want to put that on the record and make it clear." Brief for the United States at 21, n. 17 (citing *United States v. Caruso*, No. 78-8045-CR-NCR (Dec. 15, 1981) (Tr. 841)). It therefore appears that Scimone's acquittal was, in fact, partially based on "legally and logically irrelevant factors." While the former Fifth Circuit suggested in *Espinosa-Cerpa* that the conviction of a single conspirator should not be barred by the acquittal of all the alleged coconspirators in the same trial, note 9, *supra*, it did not actually reach that question. Nor is it necessary for this court to now do so in that we find that there were at least five persons other than Scimone as to whom there was substantial evidence of action in concert with Farese.

[12]The jury may not have been barred from considering other persons also. First, in addition to Scimone, *see* n. 11, *supra*, Raffone may also be includable. While the former Fifth Circuit never took a position on whether or not a conspiracy under 21 U.S.C. §846 can be a predicate offense under §848, *see United States v. Michel*, 588 F.2d 986, 1001 (5th Cir. 1979), *cert. denied*, 444 U.S. 825, 100 S.Ct. 47, 62 L.Ed.2d 32 (1979), at least one Circuit Court of Appeals has said that it can. *See United States v. Middleton*, 673 F.2d 21, 33

V. CONCLUSION

Based upon a thorough review of the applicable rules of law and the record before us, this court is of the opinion that none of the arguments raised by the appellants warrant reversal of the judgments of conviction entered below.

AFFIRMED.

R. LANIER ANDERSON, III, Circuit Judge, concurring specially:

I concur in all of the opinion authored for the court by Judge Allgood, except for Part IV.A, and I concur in the result reached in Part IV.A. I agree that there is no

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(Footnote 12 Continued)

(1st Cir. 1982). Raffone, of course, was not acquitted of the Count One conspiracy.

Second, while the former Fifth Circuit also did not decide the question of whether an overt act in violation of the drug laws may be a predicate offense under §848 even though such act is not the basis for a separate substantive count, *see Michel*, 588 F.2d at 1001, n. 15, many courts have answered that question in the affirmative. *Id.* and cases cited therein. The record of the case at bar reveals a number of overt acts which would qualify as predicate offenses under §848 and which involved persons acquitted under, or not named in, Counts One through Four.

As with Scimone, however, it is unnecessary for this court to resolve the issues of the availability of Raffone and the persons involved in the unindicted acts as persons whom the jury might have chosen from in finding "five or more other persons" under §848. Substantial evidence exists in that regard as to at least five other individuals. *See* accompanying text.

error (plain or otherwise) in the jury instructions in connection with the unanimity requirement. The trial judge charged the jury in general terms that defendant must have undertaken to commit such offenses in concert with five or more persons. The judge also charged the jury that its verdict must be unanimous. I conclude that the charge read as a whole fairly instructed the jury that they must be unanimous. For that reason, I agree that we need not address the legal issue as to whether the jury must unanimously agree on five specific persons, but I disassociate myself from any implied resolution of that legal issue in the majority opinion.

[Filed AUG 21 '78]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 78-3045

UNITED STATES OF AMERICA
Plaintiff

vs.

THOMAS RALPH FARESE, a/k/a
Tony Farese;
JOSEPH CARUSO;
PATRICK ROBINSON;
JOHN SCIMONE, a/k/a
Johnny Green;
GENO PASQUALE RAFFONE, a/k/a
Pat Raffone and
ROBERT DELLO RUSSO,
Defendants

INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT I

1. From in or about May of 1974 and continuously thereafter up to and including on or about April 7, 1977, in the Southern District of Florida and elsewhere,

THOMAS RALPH FARESE, a/k/a Tony Farese;
JOSEPH CARUSO;
PATRICK ROBINSON;
JOHN SCIMONE, a/k/a Johnny Green;
GENO PASQUALE RAFFONE, a/k/a Pat Raffone
and ROBERT DELLO RUSSO,

the defendants herein, willfully and knowingly did combine, conspire, confederate and agree together and with each other and others whose names are to the Grand Jury known and unknown to knowingly and intentionally possess with intent to distribute divers quantities of marihuana, a Schedule I controlled substance, as defined by Section 812, Title 21, United States Code, in violation of Section 841(a)(1), Title 21, United States Code.

2. It was part of said conspiracy that the defendant and co-conspirator THOMAS RALPH FARESE would organize, supervise and manage a large scale marihuana distribution operation in the Southern District of Florida and elsewhere.

3. It was further a part of said conspiracy that the defendants and co-conspirators JOSEPH CARUSO and PATRICK ROBINSON would aid the defendant and co-conspirator THOMAS RALPH FARESE in the distribution of marihuana to wholesalers and the collection of money from said wholesalers.

4. It was further a part of said conspiracy that the defendant and co-conspirator JOHN SCIMONE would act as an intermediary and bring a wholesale dealer of marihuana into contact with defendant and co-conspirator

JOSEPH CARUSO and Nicholas "Jiggs" Forlano so that future marihuana deliveries could be made.

5. It was further a part of said conspiracy that the defendant and co-conspirator ROBERT DELLO RUSSO would receive deliveries of marihuana from defendants and co-conspirators JOSEPH CARUSO and GENO PASQUALE RAFFONE to enable defendant and co-conspirator ROBERT DELLO RUSSO and others to further distribute said marihuana.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, in the Southern District of Florida and elsewhere, the defendants committed the following overt acts, among others:

1. In or about May of 1974, the defendant PATRICK ROBINSON met with marihuana wholesalers at the yard of the Corsa Boat Manufacturing Company located at 13263 N.E. 17th Avenue, Miami, Florida to discuss the delivery of marihuana.

2. In or about June of 1974, the defendant PATRICK ROBINSON delivered approximately 10,600 pounds of marihuana to wholesalers, said delivery being in three parts of approximately 4,000 pounds, approximately 4,300 pounds and approximately 2,300 pounds, respectively, all loads being picked up from the parking lot of the Corsa Boat Manufacturing Company, Miami, Florida.

3. During the period January-February 1975, PATRICK ROBINSON delivered approximately 6,000 pounds of marihuana to wholesalers, said delivery occurring at the Corsa Boat Manufacturing Company parking lot.

4. Approximately ten days after the event noted in Overt Act #3, PATRICK ROBINSON delivered approximately 3,500 pounds of marihuana to wholesalers, said delivery occurring at the Corsa Boat Manufacturing Company parking lot.

5. Approximately two weeks after the event specified in Overt Act #4, PATRICK ROBINSON delivered approximately 4,300 pounds of marihuana, said delivery occurring at the Corsa Boat Manufacturing Company parking lot.

6. In or about September of 1975, the defendant JOHN SCIMONE met with a marihuana wholesaler, said meeting occurring in New York.

7. In or about October of 1975, JOHN SCIMONE had a conversation with a wholesale dealer in marihuana, said meeting occurring in Miami, Florida.

8. In or about Octoboer of 1975, JOHN SCIMONE drove a marihuana wholesaler to North Miami, Florida to meet with Nicholas "Jiggs" Forlano.

9. In or about October of 1975, Nicholas "Jiggs" Forlano drove a marihuana wholesaler to Fort Lauderdale, Florida to pick up approximately 200 pounds of marihuana.

10. In or about late October of 1975, JOHN SCIMONE and Nicholas "Jiggs" Forlano met with the wholesaler noted in Overt Acts #8 and 9 and received from him approximately $52,000.00 in payment for the approximate 200 pounds of marihuana.

11. In or about September of 1976, the defendant JOSEPH CARUSO and Nicholas "Jiggs" Forlano met with a marihuana wholesaler at Denny's Restaurant in Hallandale, Florida.

12. In or about September of 1976, at the meeting noted in Overt Act #11, JOSEPH CARUSO gave the marihuana wholesaler a sample of marihuana and a price of $215.00 per pound was set for future deliveries.

13. In or about September of 1976, approximately three days after the meeting noted in Overt Act #11, JOSEPH CARUSO and the marihuana wholesaler met at Sambo's Restaurant on Commercial Bouelvard in Fort Lauderdale, Florida at which time JOSEPH CARUSO gave the wholesaler another sample of marihuana.

14. In or about September of 1976, approximately two days after the meeting noted in Overt Act #13, JOSEPH CARUSO met with the marihuana wholesaler at Sambo's Restaurant on Commercial Boulevard, Fort Lauderdale, Florida and delivered approximately 570 pounds of marihuana.

15. In or about September of 1976, at the meeting described in Overt Act #14, JOSEPH CARUSO received a $25,000.00 cash deposit for the marihuana delivered.

16. In or about September of 1976, JOSEPH CARUSO received approximately $100,000.00 in three installments from the wholesaler for the marihuana delivered in Overt Act #14.

17. In or about November of 1976, JOSEPH CARUSO met with the marihuana wholesaler at a shopping center between Oakland Park and Commercial Boulevards on U.S. 1 in Fort Lauderdale, Florida.

18. In or about November of 1976, JOSEPH CARUSO delivered approximately 1000 pounds of marihuana to the marihuana wholesaler at the meeting described in Overt Act #17.

19. In or about late January, 1977, the defendants THOMAS RALPH FARESE and JOSEPH CARUSO met with the marihuana wholesaler on State Road 84 near State Road 7 in Broward County, Florida.

20. At or about the end of February, 1977, JOSEPH CARUSO met with the marihuana wholesaler in Fort Lauderdale, Florida.

21. In or about March of 1977, the defendants JOSEPH CARUSO and GENO PASQUALE RAFFONE delivered approximately 2,000 pounds of marihuana to the defendant ROBERT DELLO RUSSO and the marihuana wholesaler referred to in Overt Act #20, said delivery being made in Davie, Florida.

22. In or about March of 1977, THOMAS RALPH FARESE and JOSEPH CARUSO met with the marihuana wholesaler referred to in Overt Act #20, in the parking

lot of the Howard Johnson Motel, Commercial Boulevard and U.S. 1 in Fort Lauderdale, Florida.

23. In or about March of 1977, THOMAS RALPH FARESE and JOSEPH CARUSO received approximately $59,000.00 as partial payment from the marihuana wholesaler for marihuana previously delivered.

All in violation of Title 21, United States Code, Section 846.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT II

In or about October of 1975, in the Southern District of Florida,

THOMAS RALPH FARESE, a/k/a Tony Farese,
JOSEPH CARUSO and
JOHN SCIMONE, a/k/a Johnny Green,

the defendants herein, did knowingly and intentionally possess with intent to distribute, and aided, abetted, counseled, commanded, induced and procured the knowing and intentional possession with intent to distribute of, marihuana, a Schedule I controlled substance, as defined by Section 812, Title 21, United States Code, to wit: the defendant JOHN SCIMONE drove a marihuana wholesaler to North Miami, Florida to meet with Nicholas "Jiggs" Forlano who then drove the marihuana wholesaler to Fort Lauderdale, Florida and delivered approximately 200 pounds of marihuana to the wholesaler.

All in violation of Section 841(a)(1), Title 21, United States Code and Section 2, Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT III

In or about November of 1976, in the Southern District of Florida,

THOMAS RALPH FARESE, a/k/a Tony Farese and JOSEPH CARUSO,

the defendants herein, did knowingly and intentionally possess with intent to distribute, and aided, abetted, counseled, commanded, induced and procured the knowing and intentional possession with intent to distribute of, marihuana, a Schedule I controlled substance, as defined by Section 812, Title 21, United States Code, to wit: the defendant JOSEPH CARUSO met with a marihuana wholesaler at a shopping center between Oakland Park and Commercial Boulevards, Fort Lauderdale, Florida, and delivered approximately 1000 pounds of marihuana to said marihuana wholesaler, approximately 500 pounds of which were later returned to JOSEPH CARUSO.

All in violation of Section 841(a)(1), Title 21, United States Code and Section 2, Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT IV

In or about March of 1977, in the Southern District of Florida,

THOMAS RALPH FARESE, a/k/a Tony Farese;
JOSEPH CARUSO and
GENO PASQUALE RAFFONE, a/k/a Pat Raffone,

the defendants therein, did knowingly and intentionally possess with intent to distribute, and aided, abetted, counseled, commanded, induced and procured the knowing and intentional possession with intent to distribute of, marihuana, a Schedule I controlled substance, as defined by Section 812, Title 21, United States Code, to wit: the defendants JOSEPH CARUSO and GENO PASQUALE RAFFONE delivered approximately 2,000 pounds of marihuana to marihuana wholesalers in Davie, Florida.

All in violation of Section 841(a)(1), Title 21, United States Code, and Section 2, Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT V

From on or about June 21, 1974 and continuously thereafter, up to and including on or about April 7, 1977, in the Southern District of Florida and elsewhere, THOMAS RALPH FARESE, a/k/a Tony Farese, the defendant herein, unlawfully, willfully, intentionally and

knowingly, did engage in a continuing criminal enterprise in that said defendant unlawfully, willfully, intentionally and knowingly did violate Title 21, United States Code, Sections 841 and 846 and Title 18, United States Code, Section 2, as alleged in Counts One, Two, Three and Four of this indictment which are incorporated by reference herein, which violations were part of a continuing series of violations of said statutes undertaken in concert with at least five other persons with respect to whom the said THOMAS RALPH FARESE occupied a position of organizer, supervisor and manager, and from which continuing series of violations he obtained substantial income and resources.

All in violation of Title 21, United States Code, Section 848.

A TRUE BILL

/s/ Alfred I. Copriano
FOREMAN

/s/ Jon A. Sole
for J. V. ESKENAZI
UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF FLORIDA

/s/ Atlee W. Wampler III
ATLEE W. WAMPLER, III
Attorney-in-Charge
Southeastern Regional Office
U.S. Department of Justice

/s/ Jay R. Moskowitz
JAY R. MOSKOWITZ,
Special Attorney
U.S. Department of Justice

[Filed JAN 5 '79]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-6045-Cr-SMA

UNITED STATES OF AMERICA
Plaintiff

vs.

THOMAS RALPH FARESE,
Defendant

BILL OF PARTICULARS

COMES NOW the United States of America, by and through its undersigned attorney, to answer the bill of particulars sought by the defendant THOMAS RALPH FARESE, specifically paragraphs 1, 2, 7, 8, 9, 10, 11, 12 and 13 within the scope of the Order of this Court dated October 30, 1978.

Paragraphs 1 and 2: The following is a list of the unindicted co-conspirators known to the Government in the above-captioned case.

IN ALPHABETICAL ORDER

(FNU) Allanger	Joey (LNU)
Pasquale Amato	Paul (LNU)
David Blazenstein	"Red" (LNU)
James Borshe, a/k/a Slide	Vic (LNU)

Robert Brown
Sarah Burton
Michael Centroducati
Roy Lee Corbin
Louis Dello Russo
Andrew Drielak
Angelo Farese
Jude Farese
Vincent Farese
Nicholas "Jiggs" Forlano
Philip Frye
Dominic Gambardella
John Grant
Robert Jabbour
Charles Keck
Frank Leonard
Vinnie (LNU)
William Jackson Mullinnix
Gerald Perratto
Leonard Perratto
John Phillips
Michael Phillips
John Charles Piazza, III
"The Prince"
Allen Rivenbark
Harry Roth
Martin Scheftel
"The Shiek"
Patrick Tammaro
William Tobin
William Rhett Zambito

There are also several other as yet unidentified unindicted co-conspirators.

END OF DOCKET